12-22-2014

State v. Diaz Respondent's Brief Dckt. 42103

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	No. 42103
Plaintiff-Respondent,	)	
	)	Ada Co. Case No.
vs.	)	CR-2013-7824
	)	
DOMINGO JESUS-MARTINEZ DIAZ,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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Nature Of The Case

Domingo Jesus Diaz appeals from the judgment entered upon the jury verdict finding him guilty of battery with intent to commit rape and assault with intent to commit rape. Diaz contends the district court erred in (1) denying his motion to sever, (2) allowing the presentation of I.R.E. 404(b) evidence, and (3) imposing an aggregate unified 35-year sentence with 10 years fixed.

Statement Of The Facts And Course Of The Proceedings

A grand jury indicted Diaz on two counts - battery with intent to commit rape and assault with intent to commit rape. (R., pp.26-27.) The two counts involved separate victims. (R., pp.26-27.) The battery with intent count involved Diaz's attack on J.T., which occurred on May 21, 2013. (R., p.26.) In that attack, Diaz followed J.T. after she left the 127 Club late one night. J.T. first saw Diaz when she left the club about midnight; Diaz was waiting outside and asked her for a cigarette. (Tr., p.245, L.10 – p.246, L.2.) Because J.T. could not find a taxi outside the club, she decided to walk a few blocks to the house of a friend who had been at the club earlier in the evening and who had offered to give her a ride home. (Tr., p.240, L.8 – p.244, L.19.) As J.T. was walking, she heard someone behind her. (Tr., p.250, Ls.3-9.) J.T. turned around and asked the person, who turned out to be Diaz, what he was doing. (Tr., p.250, L.16 – p.251, L.3.) Diaz did not respond, but continued to follow J.T.. (Tr., p.250, Ls.20-21, p.251, Ls.7-9.)

As Diaz got closer, J.T. again asked him what he was doing and Diaz again did not respond, but he "reached around and poked at [her] genitals with two fingers." (Tr., p.251, Ls.9-11, p.252, Ls.18-25.) Diaz "poked" J.T. twice and she told Diaz to get his "hands off" her and started running to her friend's house, which was very close by. (Tr., p.253, Ls.8-21.) Diaz chased J.T., eventually making contact with her at a shed behind J.T.'s friend's house. (Tr., p.254, Ls.8-21.) Diaz tackled J.T. to the ground, straddled her, and pinned her down with her arms behind her head. (Tr., p.254, L.25 – p.255, L.12.) As Diaz had J.T. pinned to the ground, he "pulled up his left hand and was fidgeting around," "messing with his waist line"; J.T. "assumed he was taking his belt off," but had difficulty seeing because it was "relatively dark." (Tr., p.256, L.17 – p.257, L.7.) J.T. struggled to escape and screamed, at which point some neighbors came outside. (Tr., p.257, Ls.12-14; see also Tr., p.174, L.1 – p.177, L.7 (neighbor testified he heard screaming, went outside, and saw two people struggling by the shed, after which he went to help the female who was on the ground, distraught, and appeared as though she had been punched).) When the neighbors came out, Diaz hit J.T. in the face and ran away. (Tr., p.257, Ls.13-16.)

Count II – assault with intent to commit rape - involved Diaz's attack on A.C., which occurred approximately one week after the attack on J.T., and which also began at the 127 Club. (R., p.27; Tr., p.284, L.14 – p.285, L.24, p.286, L.17

– p.287, L.12.) When A.C. left the 127 Club around 11:00 or 12:00 at night,[1] Diaz "started walking" and "following" her. (Tr., p.288, Ls.13-15.) Although A.C. did not know Diaz, she had seen him before "hanging around in the shadows back behind the bar a few times" on other nights. (Tr., p.288, L.19 – p.289, L.5.) On this night, Diaz was in the parking lot and he started following A.C. as she left the 127 Club and headed to the Construction Zone, another nearby bar. (Tr., p.292, L.25 – p.293, L.3.) Diaz was "herding" A.C., trying to get her to walk closer to closed buildings, in dark places, and saying "come look." (Tr., p.297, Ls.3-15.) A.C. was rude to Diaz because he was following her and she did not want to talk to him. (Tr., p.297, Ls.16-20.) Diaz followed A.C. all the way to the Construction Zone. (Tr., p.297, Ls.21-22.) Diaz did not go inside the bar with A.C., but waited outside until she left a couple of hours later. (Tr., p.298, L.19 – p.299, L.3, p.304, Ls.2-23.)

A.C., like J.T., was walking home late at night. (Tr., p.299, Ls.13-15.) Also, as with J.T., Diaz started following A.C. (Tr., p.304, Ls.2-15.) A.C. asked Diaz what he was doing and he said he was waiting for her and commented that they were friends. (Tr., p.304, Ls.19-23.) A.C. told Diaz that they were not friends, it was "not okay to wait for [her]" and it was "creepy." (Tr., p.304, Ls.23-25.) Undeterred, Diaz continued to follow A.C., so A.C. "picked up [her] pace." (Tr., p.306, Ls.1-8.) As before, Diaz tried to get A.C. "to go off in the shadows,"

[1] A.C. testified that she went to the 127 Club at "about 10:00 or so" and stayed "about an hour, two hours." (Tr., p.287, Ls.15-23.) Although the transcript indicates she stayed "[u]ntil about 9:00," this is clearly a typographical error as, absent time travel, A.C. could not leave the 127 Club an hour before she said she got there.

"herding" her, and telling her to "come look." (Tr., p.306, Ls.13-19, p.308, Ls.1-16.) At one point, A.C. started to run and Diaz chased her. (Tr., p.309, L.5 – p.310, L.16.) As A.C. approached her sister's house and "was at about the corner of the garage," Diaz "grabbed" her. (Tr., p.310, Ls.20-22, p.311, L. 21 – p.312, L.3.) When Diaz grabbed A.C., he "turned [her] around" and she "shoved him" and ran to her door and "rang [her] doorbell." (Tr., p.312, Ls.21-25.) A.C. could feel Diaz trying to grab her as she ran but, fortunately, he did not catch her. (Tr., p.313, Ls.12-22.) Once A.C. rang the doorbell, Diaz fled. (Tr., p.314, Ls.1-2.)

Diaz filed a motion to sever the two counts alleged in the Indictment, which the district court denied, and the state filed a motion to admit evidence pursuant to I.R.E. 404(b), which the district court granted. (R., pp.48-50, 64, 67-70; see generally Tr., pp.26-35.) The 404(b) evidence was limited to the evidence that formed the bases of Counts I and II. (R., pp.67-70.)

A jury convicted Diaz of both counts alleged in the Indictment. (R., pp.118-119.) The district court imposed a unified 20-year sentence with 10 years fixed for battery with intent to commit rape and a consecutive indeterminate 15-year term for assault with intent to commit rape. (R., pp.126-129.) Diaz timely appealed from the Judgment. (R., pp.132-134.) Diaz also filed a *pro se* I.C.R. 35 motion requesting a reduction of his sentences. (R., pp.138-141.) The court denied the motion. (R., pp.151-158.)

ISSUES

Diaz states the issues on appeal as:

1. Did the district court abuse its discretion when it denied Mr. Diaz's Motion to Sever, because the facts of his trial demonstrate that unfair prejudice resulted from the joint trial and denied him a fair trial?

2. Did the district court err when it allowed the State to present Idaho Rule of Evidence 404(b) evidence, because the proffered evidence was not relevant to any applicable exception under the rule?

3. Did the district court abuse its discretion when it imposed a unified sentence of twenty years, with ten years fixed, upon Mr. Diaz following his conviction for battery with the intent to commit rape, and a consecutive sentence of fifteen years indeterminate upon him following his conviction for assault with the intent to commit rape?

(Appellant's Brief, p.8.)

The state rephrases the issues on appeal as:

1. Has Diaz failed to show the district court abused its discretion in denying his motion to sever?

2. Has Diaz failed to show the district court erred in its I.R.E. 404(b) ruling?

3. Given the nature of the offenses, Diaz's character, and the objectives of sentencing, has Diaz failed to show that an aggregate unified 35-year sentence with 10 years fixed is excessive for two violent felonies committed with an intent to rape?

ARGUMENT

I.
Diaz Has Failed To Show The District Court Erred In Denying His Motion To Sever

A. Introduction

Diaz contends the district court abused its discretion in denying his Motion to Sever, claiming "the facts of his trial demonstrate that unfair prejudice resulted from the joint trial and denied him a fair trial." (Appellant's Brief, p.9.) To the contrary, a review of the record shows that the district court applied the correct legal standards in denying Diaz's request for severance.

B. Standard Of Review

"[A]n abuse of discretion standard is applied when reviewing the denial of a motion to sever joinder pursuant to I.C.R. 14; however, that rule presumes joinder was proper in the first place." State v. Field, 144 Idaho 559, 564, 165 P.3d 273, 278 (2007). In determining whether the district court abused its discretion, this Court considers "(1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason." State v. Ellington, ___ Idaho ___, 337 P.3d 639, 644 (2014) (quotations and citation omitted).

C. The District Court Properly Exercised Its Discretion In Denying Diaz's Motion To Sever

Count I of the Indictment charged Diaz with battery with intent to rape J.T. and Count II charged Diaz with assault with intent to rape A.C. (R., pp.26-27.) Count I was alleged to have occurred on or about May 21, 2013, and Count II was alleged to have occurred on or between May 26, 2013, and June 5, 2013. (Id.) Diaz moved to sever the charges, arguing that severance was appropriate because the charges had "no relation" to one another and "providing information about both charges to one jury [would] unfairly prejudice [him]." (R., p.48.) The district court denied the motion finding there was "little risk that a jury would cumulate or confuse the evidence" given the separate allegations involving different dates and different victims. (Tr., p.15, Ls.21-24; R., p.64.)

On appeal, Diaz contends the denial of his motion to sever rendered his trial unfair. (Appellant's Brief, p.10.) Specifically, Diaz claims he was prejudiced because "the jury may [have] conclude[d] that he was guilty of one crime and then [found] him guilty of the other simply because of his criminal disposition." (Appellant's Brief, p.,10.) Diaz further argues that, analyzing the issue under I.R.E. 404(b) supports his claim because, he concludes, "the evidence of either incident here would not have been admissible in a separate trial of the other." (Appellant's Brief, pp.11-17.) Application of the correct legal standards to the facts shows Diaz has failed to establish the district court abused its discretion in denying his motion to sever.

Idaho Criminal Rule 14 governs motions to sever and provides, in relevant part:

> If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in a complaint, indictment or information or by such joinder for trial together, the court may order the state to elect between counts, grant separate trials of counts . . . or provide whatever other relief justice requires.

"When reviewing an order denying a severance motion, the inquiry on appeal is whether the defendant has presented facts demonstrating that unfair prejudice resulted from a joint trial." State v. Tankovich, 155 Idaho 221, 227, 307 P.3d 1247, 1253 (Ct. App. 2013). Idaho appellate courts have identified three potential sources of prejudice, including the one Diaz cites on appeal (Appellant's Brief, pp.12-13) – "the possibility that the jury may conclude the defendant is guilty of one crime and then find him or her guilty of the other simply because of his or her criminal disposition, *i.e.* he or she is a bad person." State v. Equilior, 137 Idaho 903, 908, 55 P.3d 896, 901 (Ct. App. 2002).

Diaz attempts to show prejudice by relying on an analysis under I.R.E. 404(b). (Appellant's Brief, pp.11-17.) Diaz correctly notes that the Idaho Supreme Court stated, in State v. Abel, 104 Idaho 865, 868, 664 P.2d 772, 775 (1983), that courts have engaged in such an analysis when reviewing severance issues, and the Court did so in Abel. (Appellant's Brief, p.11.) That such an analysis is "useful," id., and even dispositive in some cases, does not mean it is required. Indeed, there are severance cases where I.R.E. 404(b) is never mentioned and the Court has instead applied the above-stated standard that asks "whether the defendant has presented facts demonstrating that unfair prejudice resulted from a joint trial." See, e.g., Tankovich, 155 Idaho at 227, 307 P.3d at 1253; Equilior, 137 Idaho at 908-909, 55 P.3d at 901-902. Moreover,

since Abel, the Idaho Supreme Court has recognized that "whether evidence would have been admissible absent the joinder is only a factor in determining whether a proper joinder is prejudicial." State v. Field, 144 Idaho 559, 565 n.2, 165 P.3d 273, 279 n.2 (2007).

In this case, Diaz's only argument regarding prejudicial joinder is based on his analysis under I.R.E. 404(b). (See Appellant's Brief, p.17 ("Because the evidence of either incident was not relevant under any of the Rule 404(b) exceptions, the evidence of either incident here would not have been admissible in a separate trial of the other.").) The district court did not however conduct a 404(b) analysis in response to Diaz's motion to sever[2], nor was it required to do so. Instead, the court found there was "little risk that a jury would cumulate or confuse the evidence" between the two counts. (Tr., p.15, Ls.21-24.) This is the same rationale the Court of Appeals employed in Eguilior when addressing the severance claim raised in that case. 137 Idaho at 909, 55 P.3d at 909.

"The state opened four separate cases against Eguilior. Three cases each charged one count of delivery of a controlled substance, marijuana," and the fourth cased charged one count of trafficking in marijuana, one count of possession with intent to deliver drug paraphernalia, and one count of trafficking

[2] The district court did conduct such an analysis in response to the state's I.R.E. 404(b) motion, which motion was based on the allegations in Counts I and II. Diaz has raised this 404(b) issue as a separate claim on appeal; therefore, the state will address Diaz's 404(b) argument in Section II. While this Court may elect to address the I.R.E. 404(b) issue first because it would be dispositive of the motion to sever, see Abel, supra, the state addresses the motion to sever issue separately because, as noted, a 404(b) analysis is not necessary to decide the question of whether severance was required.

in methamphetamine. Eguilior, 137 Idaho at 905, 55 P.3d at 898. The court granted the state's motion to consolidate the cases for trial after which Eguilior filed a motion to sever, which the district court denied. Id. On appeal, Eguilior claimed the district court erred in denying her motion, citing the same type of prejudice Diaz claims. Id. at 908, 55 P.3d at 901. Although the Court of Appeals discussed the cross-admissibility of some evidence, it did not conduct a 404(b) analysis. The Court than reasoned:

> Additionally, the record discloses that the evidence supporting each of the cases was separate and distinct. There were three controlled buys on three separate dates, which created the basis for the three separate marijuana delivery cases. The trafficking and paraphernalia counts stemmed from a search warrant executed on a fourth date. Although the same witnesses were, for the most part, involved in each of the cases, the witnesses were able to testify in such a manner as to separate what happened on one date versus another. Under these circumstances, there was little danger that the jury would confuse and cumulate the evidence.
>
> Furthermore, the district court gave an instruction telling the jury to consider each count separately in order to prevent any potential misuse of the evidence by the jury. The instruction given to the jury repeated almost verbatim the language found in Idaho Criminal Jury Instruction 110, the pattern jury instruction used when a defendant is on trial for more than one offense. That instruction provides that:
>
> > Each count charges a separate and distinct offense. You must decide each count separately on the evidence and the law that applies to it, uninfluenced by your decision as to any other count. The defendant may be found guilty or not guilty on any or all of the offense charged.
>
> We presume that the jury followed the district court's instructions. For these reasons, Eguilior has failed to show that unfair prejudice resulted from her trial on the consolidated cases and has failed to show that the district court abused its discretion when it denied her motion to sever.

Eguilior, 137 Idaho at 908-909, 55 P.3d at 901-902 (citations omitted).

As in Eguilior, the district court in this case found that there was "little risk that a jury would cumulate or confuse the evidence." (Tr., p.15, Ls.21-22.) In addition, the jury received an instruction identical to Idaho Criminal Jury Instruction 110.[3] (R., p.96 (Instruction No. 7).) Diaz's claim that he was prejudiced because the jury may have convicted him on both counts "simply because" he is a "bad person" (Appellant's Brief, p.17) necessarily depends on a presumption that the jury ignored Instruction No. 7, as well as the reasonable doubt instruction (R., p.91) and the elements instructions (R., pp.105, 108). However, as the Court noted in Eguilior, the presumption is the opposite because the Court "presume[s] that the jury followed the district court's instructions." 137 Idaho at 909, 55 P.3d at 902.

Because the district court correctly recognized the severance issue as discretionary (Tr., p.15, Ls.18-19), and exercised reason consistent with applicable legal standards, Diaz has failed to meet his burden of showing error in the denial of his motion to sever.

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[3] The state notes however that, during defense counsel's closing argument, the district court orally added a caveat to Instruction No. 7, which advised the jury that it was "entitled to consider all of the evidence admitted in the trial that [it found] credible and relevant to either or both counts." (Tr., p.532, L.25 – p.533, L.9.) This was necessary in light of the court's I.R.E. 404(b) ruling, which it made on the first day of trial, several months after it ruled on Diaz's motion to sever, and in light of defense counsel's closing argument in which he appeared to be suggesting that the jury could not consider all of the evidence as it related to both counts. (See generally Tr., pp.523-533.)

II.

Diaz Has Failed To Show Error In The District Court's I.R.E. 404(b) Ruling

A. Introduction

Although the district court found that the two counts alleged in the Indictment could be tried together, the state filed a Notice of Intent pursuant to I.R.E. 404(b), seeking admission of evidence in support of both counts. (R., pp.67-69; Tr., p.26, L.23 – p.27, L.12 (prosecutor explaining why motion was filed despite court's denial of Diaz's motion to sever).) The court granted the state's motion. (Tr., p.32, L.23 – p.35, L.8.) Diaz claims the district court erred because, he argues, "the proffered evidence was not relevant to any applicable exception under Rule 404(b)." (Appellant's Brief, pp.17-18.) Diaz is incorrect. The district court correctly determined that the evidence was admissible to show identity, plan, and intent.

B. Standard Of Review

Rulings under I.R.E. 404(b) are reviewed under a bifurcated standard: whether the evidence is admissible for a purpose other than propensity is given free review while the determination of whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice is reviewed for an abuse of discretion. State v. Grist, 147 Idaho 49, 51, 205 P.3d 1185, 1187 (2009).

C. Diaz Has Failed To Show Error In The District Court's I.R.E. 404(b) Ruling

To be admissible, evidence must be relevant. I.R.E. 401, 402. Evidence that tends to prove the existence of a fact of consequence in the case, and has

any tendency to make the existence of that fact more probable than it would be without the evidence is relevant. State v. Hocker, 115 Idaho 544, 547, 768 P.2d 807, 810 (Ct. App. 1989). "Evidence of other crimes, wrongs, or acts is not admissible to prove a defendant's criminal propensity. However, such evidence may be admissible for a purpose other than that prohibited by I.R.E. 404(b)." State v. Truman, 150 Idaho 714, 249 P.3d 1169 (Ct. App. 2011) (citations omitted). Under I.R.E. 404(b), evidence of prior wrongs or acts may be admitted to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. I.R.E. 404(b); State v. Phillips, 123 Idaho 178, 845 P.2d 1211 (1993). As long as the evidence is relevant to prove some issue other than the defendant's character and its probative value for the proper purpose is not substantially outweighed by the probability of unfair prejudice, it is not error to admit it. State v. Cross, 132 Idaho 667, 670, 978 P.2d 227, 230 (1999).[4]

In ruling on the state's 404(b) motion, the district court stated:

> In this case what you have are two separate alleged victims temporally connected. They are -- it's very -- you're talking about one is May 21st, the other one is either May 26th or up to June 5th. So Count No. One, it happens first, Count No. Two, which is the assault with the intent -- and so they're -- they're connected

[4] The second step in a 404(b) analysis involves a determination of whether the evidence, although relevant, should be excluded because the danger of unfair prejudice substantially outweighs its probative value. State v. Sheahan, 139 Idaho 267, 275-76, 77 P.3d 956, 964-65 (2003). Because Diaz does not challenge the district court's prejudice analysis, this Court need not review that portion of the district court's decision. (Appellant's Brief, pp.17-18 (arguing only that the evidence was not relevant).) Even if considered, there is no error in the district court's discretionary decision that "the probative value of the evidence [was] not substantially outweighed by the danger of unfair prejudice." (Tr., p.34, Ls.12-16.)

> temporally. They're connected by general vicinity. They're connected by the modus operandi, the way in which these were perpetrated. And as the -- so they certainly go to preparation. They go to plan. They go to identity. And the fact that identity can be established otherwise does not change the fact that it does go to identity.
>
> But more importantly they are actually -- Count No. One becomes very important to establishing what the State has to establish, an element of the crime, which is the specific intent to commit a serious felony.
>
> Because it's an assault with the intent, the State has to prove that it wasn't just a simple assault, but that there was something beyond that and that there was an intent to commit the crime of what they've alleged of rape. It is what happened in Count One that helps to establish that.
>
> So it's not simply propensity, but it goes directly to whether he actually was committing the crime to which he has been charged.

(Tr., p.33, L.3 – p.34, L.7.)

Diaz challenges the validity of the district court's determination that the evidence was admissible to show identity, plan, and intent.[5] (Appellant's Brief, pp.12-18.) First addressing identity, Diaz argues the "[e]vidence of either

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[5] Diaz also argues the evidence was not admissible to show absence of mistake or accident. (Appellant's Brief, pp.15-16.) However, as Diaz acknowledges, the district court did not find the evidence admissible for this purpose. (Appellant's Brief, p.15; Tr., p.32, L.23 – p.35, L.8.) Nor was this a grounds identified by the state in its notice of intent. (R., p.70 ("the State intends to use this evidence to prove intent, as well as identity and common scheme or plan").) Diaz's argument that the state "essentially argued that" the evidence was "relevant to absence of mistake or accident" is based on comments the prosecutor made at the hearing on the motion to sever, which was three months before the state even filed its 404(b) notice. (Appellant's Brief, pp.15-16 (quoting Tr., p.13, Ls.5-19).) Because the state did not proffer the evidence as relevant to absence of mistake or accident and because the district court did not find it relevant for this purpose, the state will not respond further to Diaz's argument on this point other than to note that Diaz did tell law enforcement that he may have "accidentally touched" the "breast area" of a girl (presumably J.T.), who he claims he was trying to help because she was drunk. (Tr., p.420, L.21 – p.421, L.6.)

incident was not relevant with respect to identity, because identity was not at issue in this case." (Appellant's Brief, p.12.) According to Diaz, if he "did not place identity at issue," then evidence of identity is not relevant. (Appellant's Brief, p.12.) This argument fails for several reasons.

First, in support of his assertion that identity was not at issue, Diaz relies on defense counsel's opening statement where counsel stated that Diaz "admits he was there. He admits having some interaction with these two alleged victims. And he does admit that there was some physical contact between him and each of these alleged victims. It's undisputed that there was physical contact between these people." (Appellant's Brief, pp.12-13 (quoting Tr., p.161, Ls.5-11.) However, Diaz did not make this argument at the 404(b) hearing. In response to the state's indication that the evidence was relevant to identity, defense counsel said:

> The State talks a lot in their argument today about identity and I think that it's very likely that they'll be able to establish the identity of the alleged perpetrator even without the purported 404(b) evidence. And so I'd ask the Court in an exercise of discretion to rule against them on this issue recognizing that identity is not the main goal of the State's purported evidence.

(Tr., p.29, Ls.10-18.)

Diaz did not argue at the time of the district court's ruling that the evidence was not admissible to establish identity because counsel planned to concede identity in his opening statement. Thus, that argument is not preserved and should not be considered as a basis for finding error in the district court's decision. State v. Severson, 147 Idaho 694, 715, 215 P.3d 414, 435 (2009) ("As a general rule, we will not consider arguments made for the first time on

appeal."). Further, regardless of what defense counsel said in his opening statement, those comments did not constitute evidence, and the jury was so instructed. (R., p.101 (Instruction No. 11); Tr., p.474, Ls.19-25.)

Second, as to the merits of the argument Diaz actually made in response to identity as a proper purpose, the district court aptly noted: "the fact that identity can be established otherwise does not change the fact that it goes to identity." (Tr., p.33, Ls.14-17.) Identity is an element of both charged offenses that the state was required to prove at trial. (See R., p.105 (elements instruction for battery with intent to commit rape), p.108 (elements instruction for assault with intent to commit rape).) That Diaz made some statements to law enforcement admitting he contacted two different women around the 127 Club in similar circumstances (see generally Tr., pp.443-448 (Officer Gomez summarizing Diaz's versions)), does not mean the state was excused from proving all elements of both crimes, including Diaz's identity. See State v. Cardoza, 155 Idaho 889, 893, 318 P.3d 658, 662 (Ct. App. 2014) (rejecting defendant's argument that court erred in allowing state to present 404(b) evidence to prove knowledge in case-in-chief because "he had not yet, in the course of trial disputed that knowledge," finding the argument "unsupportable" because defendant "pleaded not guilty, thereby contesting the charge" on which the state bore the burden of proving all elements, including knowledge). This is especially true given that Diaz did not actually know the women and his claims about what actually happened differed from the victims' testimony. Moreover, during cross-examination of J.T., defense counsel asked a question suggesting

that J.T. did not get a "good look" at her attacker's face because it was dark, and only "recognize[d] him in general because [she] saw him earlier." (Tr., p.275, L.24 – p.276, L.14.) Such a question certainly invokes questions regarding identity.

In addition, evidence that Diaz attacked two separate victims using a similar modus operandi was relevant to prove identity. See, e.g., State v. Martin, 118 Idaho 334, 796 P.2d 1007 (1990). As explained in Martin:

> *Modus operandi* is generally a means of proving the identity of the crime charged, by demonstrating that the defendant had committed in the past other crimes sharing with the present offense features significantly unique to make it likely that the same person committed the several crimes. While it is important that the evidence bear a high degree of similarity in order to show a *modus operandi*, the circumstances of the prior offenses need not be identical to those of the crime charged.

118 Idaho at 337, 796 P.2d at 1010 (quotations and citations omitted).

In Martin, the state charged the defendant with second degree burglary and rape. 118 Idaho at 335, 796 P.2d at 1008. At trial, the court admitted evidence of two prior sex offense convictions – one for assault with intent to commit rape and one for rape – for purposes of proving identity based on the similar modus operandi used in committing the offenses. Id. at 335-336, 796 P.2d at 1008-1009. The Idaho Supreme Court affirmed the trial court's ruling, finding "that the circumstances of Martin's two prior sex offenses were sufficiently similar to the circumstances of the sex offense charged to make them relevant to the issue of identity." Id. at 340, 796 P.2d at 1013. The same conclusion is warranted in this case given the many similarities between Diaz's attack on J.T.

and his subsequent attack on A.C. Diaz has failed to show it was error to admit evidence relating to both counts for this proper purpose.

Diaz next argues "evidence of either incident was not relevant with respect to a common scheme or plan because it did not show a planned course of connected behavior." (Appellant's Brief, p.13.) More specifically, Diaz contends the "evidence of either incident here 'is not relevant to show a common scheme or plan because it . . . does not demonstrate a planned course of connected behavior.'" (Appellant's Brief, p.14 (quoting State v. Joy, 155 Idaho 1, 10, 304 P.3d 276, 285 (2013) (ellipses by Diaz).) Diaz's argument fails because the allegations underlying Counts I and II have "more than a superficial similarity" and are instead "linked by common characteristics that go beyond merely showing a criminal propensity and instead [ ] objectively tend to establish that [Diaz] committed [both] acts." Joy, 155 Idaho at 9-10, 304 P.3d at 284-285. That Diaz had a modus operandi for stalking victims at bars supports the conclusion that he his conduct was part of a predatory plan, as opposed to him taking

advantage of opportunistic circumstances.[6] Joy, upon which Diaz relies, does not support a contrary conclusion.

In Joy, the Idaho Supreme Court described common scheme or plan "contemplated by Rule 404(b)" as one that "'embrac[es] the commission of two or more crimes *so related to each other* that proof of one tends to establish the other.'" Joy, 155 Idaho at 9, 304 P.3d at 284 (quoting Grist, 147 Idaho at 54-55, 205 P.3d at 1190-91) (alteration added). The Court further explained:

> In [State v. Johnson, 148 Idaho 664, 668, 227 P.3d 918, 922 (2010)], the Court explained that at a minimum, this rule requires, evidence of a common scheme or plan beyond the bare fact that the defendant has committed the same kind of misconduct in the past. Rather, the events must be linked by common characteristics that go beyond merely showing a criminal propensity and instead must objectively tend to establish that the same person committed all the acts. . . . In cases where no direct evidence exists to show the existence of a common plan may legitimately be inferred.
>
> . . . Thus, to be admissible under Rule 404(b), evidence of prior misconduct must show more than a superficial similarity to the nature and details of the charged conduct, but must instead show that the defendant's charged and uncharged conduct is linked in a way that permits the inference that the prior conduct was planned as part of a course of conduct leading up to the charged offense.

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[6] This type of distinction is supported by "psychological literature." (PSI, p.58.) As noted by the psychosexual evaluator: "The psychological literature has indicated that some sexual offenders act in opportunistic ways, and others have predatory behavior. The difference can be understood as a measure of the level of planning and how deliberately a sexual offender acts on plans." (PSI, p.58.) "[S]exual predatory behavior" occurs "when the sexual offender specifically targets particular individuals, and has detailed plans on how to engage victims, carefully developing methods to sexually offend, and considering all imaginable contingencies in order to minimize the likelihood of being arrested." Sexual offenders "[i]n the middle . . . have loosely developed plans, or deliberately seek out situations in which they may have victim access, but do not consistently fantasize about how to victimize others, or do not have detailed methods developed that consider ways to sexually engage a victim or avoid being arrested." (PSI, p.59.)

Joy, 155 Idaho at 9-10, 304 P.3d at 284-285 (quotations, alterations, and some citations omitted).)

Diaz, a would-be serial rapist, targeted women who went to the 127 Club. Diaz attempts to diffuse the striking similarities between both counts by noting the "different levels of verbal interaction" and "different conduct" between the "two incidents," and the "different ages of the alleged [sic] victims." (Appellant's Brief, p.15.) These distinctions are hardly noteworthy in the context of whether his conduct was indicative of a common scheme or plan and do not withstand scrutiny. Regardless of any differences in their ages, Diaz targeted women leaving a particular club, followed them, and attacked them. That he was willing to engage in more conversation with A.C. than J.T. in response to her asking him what he was doing hardly shows that his actions were not consistent with a plan. Diaz has failed to show otherwise.

Finally, Diaz contends "the evidence of either incident was not relevant to intent," arguing "the evidence of either incident was too attenuated to be relevant to intent." (Appellant's Brief, p.16.) This argument appears to be predicated on the differences between what Diaz's two victims thought. (Appellant's Brief, p.16.) Diaz notes that J.T. "testified that she thought Mr. Diaz was going to rape her" whereas the other victim testified that, at first, she thought Diaz was "trying to coax her into the shadows" because "he wanted to kiss her" but after Diaz chased her to her sister's house she thought he "'was probably going to try to force [her] to do something,' without being asked by the State to specify further" what that "something" might be. (Appellant's Brief, p.16 (citing Tr., p.281, Ls.5-9,

p.325, Ls.16-23, p.310, Ls.6-13, and quoting Tr., p.314, Ls.20-23).) Diaz also notes that "Detective Gomez testified that Mr. Diaz never admitted that he had the intent to rape [J.T.] or anyone else, and additionally stated that [J.T.] was too old for him." (Appellant's Brief, pp.16-17 (citing Tr., p.463, Ls.3-16).) From this Diaz concludes the "incidents are readily distinguishable" and are "too attenuated to be relevant to intent." (Appellant's Brief, p.17.) In support of his argument, Diaz relies on Joy, supra. Diaz's argument is without merit.

Diaz's reliance on Joy is again misplaced. The Court in Joy did not discuss the use of 404(b) evidence to show intent. Instead, the Court considered the use of such evidence for purposes of demonstrating common scheme or plan, motive, and absence of mistake. Joy, 155 Idaho at 9-11, 304 P.3d at 284-286. The Court's comment regarding attenuation related to the latter two purposes. Id. at 11, 304 P.3d at 286. Specifically, the Court found that the prior bad acts admitted at Joy's trial were not "relevant to motive or absence of mistake" because the "prior conduct occurred in a very different setting from the charged conduct, which involved an ongoing physical confrontation" and the "charged conduct involved a foreign object," whereas the prior bad acts did not. Id. Even if this attenuation theory of admissibility could apply to an analysis of whether a prior bad act could be admitted to show intent, such an analysis would not support Diaz's claim that the evidence was not admissible for this purpose.

In order to meet its burden of proof, the state was required to prove, with respect to both charged offenses, that Diaz had the "specific intent to use such force as was necessary to cause his penis to penetrate, however slightly, [the

victim's] vaginal opening, without her consent." (R., p.105 (elements instruction for battery with intent to commit rape); p.108 (elements instruction for assault with intent to commit rape).) This element was the primary focus of defense counsel's closing argument where counsel vigorously argued that the state had not met its burden of proving Diaz had any intent to rape. (Tr., p.513, L.24 – p.523, L.7.) As part of the argument, defense counsel noted that there was "no evidence that [Diaz] touched [A.C.'s] pants at any point during th[e] process" (Tr., p.523, Ls.5-7), as he did during his attack on J.T. Defense counsel's closing argument illustrates precisely why any evidence of Diaz's intent, such as him grabbing his waistline as he straddled J.T., was relevant and properly admitted to prove intent on both counts.

As for Diaz's argument on appeal highlighting that J.T. testified she thought Diaz was going to rape her whereas A.C. testified that she thought Diaz was going to force her to do "something," the state fails to understand why this difference, especially where the "something" A.C. referred to seems to be obviously sexual in nature, shows the evidence was not relevant to Diaz's intent. Differences in the victims' use of specific words to describe what they thought Diaz was going to do does not render the evidence irrelevant for purposes of proving intent and Diaz cites not case that supports such an argument.

D. Even If This Court Concludes Diaz Has Met His Burden Of Showing Evidentiary Error, Any Such Error Is Harmless

Idaho Criminal Rule 52 provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." I.C.R. 52.

The inquiry is whether "'the guilty verdict actually rendered in this trial was surely unattributable to the error.'" Joy, 155 Idaho at 11, 304 P.3d at 286 (quoting Sullivan v. Louisiana, 508 U.S. 275, 279 (1993) (emphasis omitted)).

Even if the district court erred in permitting evidence of both offenses in the same trial, such error is harmless. With respect to the count involving J.T., her testimony, along with the neighbor's testimony that he witnessed the struggle between J.T. and a male assailant and her condition following the attack, as well as the surveillance footage showing Diaz following J.T. and running away after the attack, and his admissions related to his encounter with a female on that night under similar circumstances, this Court can easily conclude the guilty verdict on Count I was surely unattributable to the admission of the evidence related to the count involving A.C.

The same is true for Count II – the aggravated assault with intent to rape A.C. Based on A.C.'s testimony and Diaz's admissions related to his contact with a female on that night that included many of the same details relayed by A.C., this Court can conclude that the guilty verdict on Count II was surely unattributable to the admission of the evidence related to the count involving J.T.

Given the evidence presented, any error in the admission of the I.R.E. 404(b) evidence was harmless.[7]

[7] The same harmless error analysis would apply to the motion to sever.

III.
Diaz Has Failed To Show The District Court Abused Its Sentencing Discretion

A. Introduction

Diaz contends the district court abused its sentencing discretion and "should have instead followed [his] sentencing recommendation" of concurrent ten-year sentences with three years fixed. (Appellant's Brief, p.19.) In support of this assertion, Diaz claims the "district court did not give adequate consideration to mitigating factors." (Appellant's Brief, p.20.) Neither the law nor the facts support Diaz's claim that his aggregate 35-year sentence with 10 years fixed is excessive.

B. Standard Of Review

"Where the sentence imposed by a trial court is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion." State v. Miller, 151 Idaho 828, 834, 264 P.3d 935, 941 (2011) (quotations and citations omitted). "In deference to the trial judge, this Court will not substitute its view of a reasonable sentence where reasonable minds might differ." Id.

C. The District Court Did Not Abuse Its Sentencing Discretion

A jury convicted Diaz of both battery with intent to commit rape and aggravated assault with intent to commit rape. (R., pp.118-119.) Battery with intent to commit rape is punishable by up to 20 years in prison, I.C. § 18-912 (2006), and assault with intent to commit rape is punishable by up to 15 years in prison, I.C. § 18-910 (2006). It is within the court's discretion to order sentences

to run consecutively. State v. Elliott, 121 Idaho 48, 52, 822 P.2d 567, 571 (Ct. App. 1991) ("pursuant to both statutory and case law, the decision whether to have [a defendant's] sentences run concurrently or consecutively is within the sound discretion of the trial court"). Because Diaz's aggregate 35-year sentence with 10 years fixed is within statutory limits, Diaz has the burden of showing a clear abuse of discretion.

"When reviewing the reasonableness of a sentence this Court will make an independent examination of the record, having regard to the nature of the offense, the character of the offender and the protection of the public interest." Miller, 151 Idaho at 834, 264 P.3d at 941 (quotations and citation omitted). The four objectives of sentencing are well-established. They are "(1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution." State v. Knighton, 143 Idaho 318, 319-320, 144 P.3d 23, 24-25 (2006) (quotations and citations omitted). "A sentence need not serve all sentencing goals; one may be sufficient." State v. Sheahan, 139 Idaho 267, 285, 77 P.3d 956, 974 (2003) (citing State v. Waddell, 119 Idaho 238, 241, 804 P.2d 1369, 1372 (Ct. App. 1991)). "The primary consideration is, and presumptively always will be, the good order and protection of society. All other factors are, and must be, subservient to that end." State v. Ozuna, 155 Idaho 697, 705, 316 P.3d 109, 117 (Ct. App. 2013)

In imposing sentence, the district court noted its consideration of the objectives of sentencing and the primary objective of protecting society. (Tr.,

p.579, Ls.18-23.) The court detailed Diaz's criminal history, his poor behavior while in school and since he has been incarcerated, and the psychosexual evaluator's finding that Diaz is "a high risk to reoffend within the next five to ten years." (Tr., p.580, L.11 – p.593, L.24.) The court also noted the evaluator's observation that Diaz "seemed best classified as being on the predatory end." (Tr., p.599, Ls.9-11.) Based on these factors, and the court's well-founded concern that Diaz "presents a real and present danger to the community," the court imposed an aggregate 35-year sentence with 10 years fixed. (Tr., p.600, Ls.2-5, p.604, Ls.2-3.)

Diaz contends the district court abused its discretion because, he argues, the court did not "adequately consider" his age, his "possible future amenability to treatment," and that Counts I and II are his first felony convictions. (Appellant's Brief, pp.20-21.) According to Diaz, "adequate consideration" of these factors "should have resulted in a lesser sentence." (Appellant's Brief, p.21.) However, the fact that Diaz did not receive the sentence he requested does not mean the court's consideration of the "mitigating factors" was inadequate.

While Counts I and II may be Diaz's first felony convictions, they are serious violent felonies that were committed within days of each other. Further, as noted by the district court, even though Diaz did not have prior felonies, he "quickly accumulated a very significant record" since entering this country in 2009. (Tr., p.580, Ls.11-15.) Although Diaz "denied previous arrests" when speaking to the presentence investigator, a review of the "juvenile and adult criminal records disputed his assertion." (PSI, p.18.) Between 2011 and 2012,

Diaz was convicted of battery, reckless driving, a drivers license violation, contempt, possession of drug paraphernalia, and resisting and obstructing. (PSI, pp.7-9.) Diaz also violated his probation during that timeframe. (PSI, p.9.) In addition, while not criminal in nature, Diaz's conduct while in high school supports the district court's concerns about Diaz's behavior and amenability to supervision and rehabilitation. Diaz's "[s]chool records revealed nineteen (19) behavior incidents over about a fifteen (15) month[ ] period of time. Mr. Diaz was characterized by the school records as a bully on and off the school grounds. He was disciplined for searching for sexually inappropriate pictures on the internet," and "[he] made sexually inappropriate gestures towards a teacher." (PSI, p.18.) The fact that Diaz has managed to accumulate such a record by 19-years-old seriously undermines his claim that he is entitled to a lesser sentence because of his age.

As for Diaz's claim that the district court did not "adequately consider" the psychosexual evaluator's comments regarding "possible future amenability to treatment," the record shows otherwise. (Appellant's Brief, p.21.) What the evaluator actually said was that Diaz was not "amenable for sexual offender treatment at this time" and that he was "less likely to comply with supervision than the typical sexual offender, based on extreme minimization/denial of his sexual offense, number of static risk variables, number of dynamic risk variables, antisocial attitude, limited protective variables, and what appeared to be overall resistance to being held accountable for his behavior." (PSI, p.34; see also p.63 (Diaz not amenable for sexual offender treatment due to "extreme minimization of

his sexual offense, having personality characteristics that could be resistant to the treatment process, and not appearing to be willing to discuss aspects of his sexual offense").) That the evaluator acknowledged individuals "can become amenable for treatment over time," he said nothing of the likelihood that Diaz himself would. (PSI, p.63.) Instead, the evaluator advised that Diaz should "continue[ ] to be monitored, and **if** amenability presented," he should participate in treatment "in a structured environment" "at that time." (PSI, p.63 (emphasis added).)

The district court discussed the evaluator's findings in detail at sentencing and adequately considered them before imposing sentence. (Tr., p.591, L.10 – p.600, L.24.) Diaz is a high risk to reoffend and, at the time of sentencing, was not amenable to treatment. Diaz has the opportunity to prove otherwise during his 10-year determinate term. In the meantime, the district court did not abuse its discretion in imposing a 10-year fixed term at the time of sentencing given that Diaz is a danger to the community who demonstrated he was not a good candidate for supervision, and the 25-year indeterminate term was more than justified in order to allow long-term supervision if and when Diaz is released into the community.

For the foregoing reasons, and the reasons articulated in the district court's Order Denying Rule 35 Motion, a copy of which is attached as Appendix A, Diaz has failed to meet his burden of showing his sentence is excessive.

CONCLUSION

The state respectfully requests that this Court affirm the judgment and sentences entered upon the jury verdicts finding Diaz guilty of battery with intent to commit rape and assault with intent to commit rape.

DATED this 22nd day of December, 2014.

JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 22nd day of December 2014, served a true and correct copy of the attached RESPONDENT'S BRIEF by causing a copy addressed to:

BEN P. MCGREEVY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in the State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

JESSICA M. LORELLO
Deputy Attorney General

APPENDIX A

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO,

Plaintiff,

vs.

DOMINGO JESUS DIAZ,

Defendant.

Case No. CR-FE-2013-0007824

ORDER DENYING RULE 35 MOTION

On May 8, 2014, the Defendant, DOMINGO JESUS DIAZ, filed a Motion for Reduction of Sentence pursuant to Rule 35 and requested this Court appoint counsel. The Court denied his motion for counsel on May 8, 2014.

The Court sentenced Diaz on April 16, 2014, for the felony offenses of Count I. Battery with Intent to Commit a Serious Felony to twenty (20) years aggregate with ten (10) years determinate, and on Count II. Assault with the Intent to Commit a Serious Felony to an aggregate term of fifteen (15) years with zero (0) years determinate. The Court further ordered Count II to run consecutive to Count I.

Diaz complains about the aggregate sentence and the determinate portion for each count. He also complains about the decision to run Count II consecutive to Count I. He requests leniency and requests the Court reduce the sentences to two (2) years fixed followed by four (4) years indeterminate for a total of six (6) years on each count to run concurrent. This would effectively reduce his entire sentence from thirty-five (35) years aggregate to six (6) years and reduce the determinate time from ten (10) years to two (2) years.

His request is based on his unsupported conclusion that he was discriminated against and that he will be deported. In making its decision, the Court carefully considered his criminal history and aggressive behavior since entering this country. The Court further considered the facts of these crimes. The Court also applied the *Toohill* factors.

Based on the following, the Court denies his motion.

ANALYSIS

Diaz requests leniency because he claims he was discriminated against and that his history did not justify the sentence. He presented no new evidence that the Court had not considered at sentencing. The Court rejects his request. Rule 35, I.C.R., provides in pertinent part as follows:

> (M)otions to correct or modify sentences under this rule must be filed within 120 days of the entry of the judgment imposing sentence or order releasing retained jurisdiction and shall be considered and determined by the court without the admission of additional testimony and without oral argument, unless otherwise ordered by the court in its discretion; . . . .

The determination of whether to grant the relief requested by Diaz is a matter committed to the Court's discretion and the Court's decision is governed by the same standard as the original sentence. *See State v. Gardiner*, 127 Idaho 156, 164, 989 P.2d 615 (Ct. App. 1995); *State v. Ricks*, 120 Idaho 875 (Ct. App. 1991). In this review, this Court has employed the standards set forth in *State v. Toohill*, 103 Idaho 565, 650 P.2d 707 (Ct. App. 1982).

The Court understood that this was a matter of discretion and considered several factors both in the original sentencing and in deciding this Motion For Reconsideration. A sentence has several objectives: (1) protection of society, (2) deterrence of the individual and the public generally, (3) possibility of rehabilitation, and (4) punishment for wrongdoing. The primary consideration is, and should be, "the good order and protection of society." *State v. Toohill*, 103 Idaho 565, 650 P.2d 707 (Ct. App. 1982).

In any sentencing, the primary focus begins with a concern for protection of the public. In this case, a jury found Diaz guilty of the felony offenses of Battery with Intent to Commit a Serious Felony and Assault with the Intent to Commit a Serious Felony. On Count I, the Court imposed an aggregate term of twenty (20) years with ten (10) years determinate and on Count II an aggregate term of fifteen (15) years with zero (0) years determinate. The Court further ordered Count II to run consecutive to Count I, making his aggregate sentence thirty-five (35) years with ten (10) years determinate. The maximum penalty for Battery with Intent to Commit a Serious Felony is twenty (20) years and the maximum penalty for Assault with the Intent to Commit a Serious Felony is fifteen (15) years. Thus, Diaz faced a potential maximum determinate (fixed) sentence of thirty-five (35) years.

grabbed her, threw her to the ground, straddled her, and pinned her arms to her sides. Ms. Thomas said she yelled, which drew attention of neighbors. The man punched Ms. Thomas in the mouth before being scared away by neighbors. Ms. Thomas and the neighbors described the assailant to police.

Meridian Parks and Recreation provided a video surveillance tape of the area around the 127 Club. Officers were able to retrieve a photo of a man identified as Domingo Diaz. Mr. Diaz was arrested June 7, 2013.

Officers interview Mr. Diaz at the Ada County Jail on June 11, 2013. He admitted hanging around the 127 Club and following Jennifer Thomas. He claimed she asked him to hold her up as they walked. Mr. Diaz admitted walking Ms. Thomas to the side of a shed where she told police the attack occurred. Mr. Diaz denied attacking Ms. Thomas. He said he tried to help Ms. Thomas and she screamed someone's name and flailed her arms. He admitted he might have accidentally touched her breasts while helping her and might have accidentally hit Ms. Thomas in the mouth at the same time. Mr. Diaz described what he wore and confirmed the surveillance video showed an image of him. He denied having sexual intent with Ms. Thomas.

Mr. Diaz admitted meeting another female at the 127 Club a few weeks prior to this event. He said together they walked toward the Construction Zone Bar and for some unknown reason the woman ran off screaming. He said he knocked on the car window of another female patron from the 127 Club to ask for a cigarette. Mr. Diaz admitted he often loitered around the bushes and parking lot of the 127 Club. He admitted asking females for cigarettes even though he had his own cigarettes.

Det. David Gomez described meeting Domingo Diaz a few years ago. At the time Mr. Diaz was about fourteen (14) or fifteen (15) years old. Det. Gomez said the family was soon contacting him through dispatch, asking him to talk with Mr. Diaz about his associates. Family suspected Mr. Diaz was getting into drugs and hanging out with people who appeared to be in gangs. Det. Gomez wrote that Mr. Diaz began distancing himself from the officer.

On June 12, 2013, Det. Gomez listened to a jail phone call from Mr. Diaz to a female named Raquel. Mr. Diaz explained to Raquel he was not going to be deported and was being charged with a Felony for something that happened with a girl. He said the police wanted a sweater that was at Raquel's house. Mr. Diaz asked Raquel to speak in "Backward Spanish" (Pig Latin.) That conversation included comments from Mr. Diaz about burning a sweatshirt or sweater. Raquel indicated it was done, or to consider it done. Raquel told Mr. Diaz police took pictures of his bicycle. He admitted telling police Abel sold him the bike. Mr. Diaz stated Abel had not sold him the bike but police were after Abel for an incident, and they laughed about it. Mr. Diaz said if Raquel bonded him out of jail he would immediately flee to Mexico because he didn't want to be in any more "crap." Raquel suggested Mr. Diaz bargain with police with his knowledge of drug dealers in the area.

[INVESTIGATOR'S NOTE: Mr. Diaz's sister's name was Raquel Diaz.]

Police talked to Mr. Diaz's brother, Fabricio Martinez. Fabricio said Mr. Diaz lived with him. He let police into Mr. Diaz's bedroom. When officers tried to get consent from Mr. Diaz to search his bedroom he refused to sign the form.

On June 19, 2013, police met with Angel Caldwell. While visiting from Oregon she spent time at the 127 Club. Ms. Caldwell told police about seeing a Hispanic male with a

skateboard hanging around outside the bar. She recalled the man popped out of bushes and then disappeared. Ms. Caldwell walked to the Construction Zone Bar from the 127 Club. The Hispanic man walked with her/followed her. She said the man offered her a "hit" from a small pipe. Ms. Caldwell guessed she was in the Construction Zone Bar several hours. When she left the bar the Hispanic man followed her. Near her house he grabbed Ms. Caldwell by putting his hands on her shoulders to stop her. Ms. Caldwell said she pushed him away, ran to the house and rang the doorbell. She stated while following her the man tried to coax her off the sidewalk into the shadows. She said she did not become afraid until he grabbed her.

Police interviewed Mr. Diaz on June 26, 2013. On a map he indicated the route he and Ms. Caldwell walked. Asked about the cubby hole beside the 127 Club Mr. Diaz appeared nervous. He stated he did not know where police questions were going or what the girl [Ms. Caldwell] accused him of doing. He invoked his Miranda Rights and stopped the interview.

DR# 20 12-2998 was included with other police reports for this case. On May 15, 2012, Meridian Police were dispatched on a sexual assault call. The caller said her friend Brittney was hit by two (2) males who "knocked her down and put hand down face." One male had a bandana on his face. Seventeen (17) year old Brittney said a male "grabbed" her bottom. He pushed her down and got on top of her. He pulled her shirt up and put his hand down her pants. When he got up he kicked her and both men fled. Brittney said the man who assaulted her wore a white baseball shirt like a team uniform. He kept asking for the time.

Det. Gomez talked with Mr. Diaz about the attack on Brittney. Mr. Diaz implicated Abel Anrique Garcia and another male as the two (2) who had contact with Brittney. He claimed Abel told him about contact with a girl on a skateboard near the train tracks. Mr. Diaz said he now owned the BMX bike Abel owned at the time of the Brittney attack. Mr. Diaz's brother, Fabricio, allowed police to photograph the BMX bike, which was parked at his house.

Abel Garcia told police he got the jersey he was wearing from Domingo Diaz. It matched the description of the jersey in the Brittney case. He claimed Mr. Diaz told him that he ran from police because he touched a girl who was on a longboard (skateboard) and ran when someone yelled. Abel later traded Mr. Diaz for the jersey because Mr. Diaz said it was "hot." Mr. Diaz supposedly said, "I'm going to burn that shirt today." Abel said Mr. Diaz was with "Arabian," a male later identified as Ahmed Alsaady Jr., aka Ahmed Menwer, aka Ahmad Salam Menwer.

Officers interviewed Ahmed Menwer. Ahmed described the Brittney incident. He admitted being with Mr. Diaz when there was a problem with a girl on a skateboard. Ahmed said Mr. Diaz placed his bicycle on the corner of a street and walked towards the girl with the skateboard. He claimed he told Mr. Diaz to leave the girl alone. Ahmed said he rode his bike away from Mr. Diaz because he knew something was going to happen and he did not want trouble. When Ahmed asked Mr. Diaz what happened, Mr. Diaz said he asked the girl what time it was.

DR# 2013-4298 is a summary of Mr. Diaz's phone call to Raquel dated June 12, 2013, a person he frequently called.

During a conversation Mr. Diaz asked Raquel if she understood "backwards Spanish," similar to "Pig Latin." In backwards Spanish Mr. Diaz asked Raquel if she burned a jacket. Raquel responded it was done or consider it done.

Mr. Diaz described the jacket as a blue hoodie in question, which was at her house and not at Fabricio's house.

Raquel Martinez was interviewed by police. She said Mr. Diaz lived with her two (2) weeks prior to his arrest on a Fail to Appear warrant. Asked about a hoodie sweatshirt Raquel denied knowing what Det. Gomez was talking about. Confronted about the phone conversations between her and Mr. Diaz, Raquel continued to deny knowing about the garment. Raquel then told a story about boxing Mr. Diaz's clothes and throwing them in trash bins at Goodwood BBQ. She provided a letter written in English by Mr. Diaz. It talked about him going back to Mexico. Raquel said she thought Mr. Diaz was gone so threw out his clothing. Raquel continued denying knowledge of where the suspect sweater ended up.

***

VICTIM'S STATEMENT:

Jennifer Thomas and Angel Caldwell were identified as victims. On January 21, 2014, this investigator sent a letter to Ms. Thomas at her Meridian address. It was later learned she moved to Arizona. On February 10, 2014, letters were sent to Ms. Thomas at Arizona and Ms. Caldwell at Oregon. The women were provided all contact information for this office. They were encouraged to submit a written Victim Impact Statement. They were invited to contact this office to schedule a telephone interview. As of March 10, 2014, there was no response from either party. Anything submitted will be forwarded to the Court.

Some of the victim statements were included in the psychosexual report from Dr. Michael Johnston. Information attributed to Jennifer Thomas included her stating Mr. Diaz followed her from a bar after she gave him a cigarette. She stated Mr. Diaz poked her repeatedly with two (2) fingers in the vaginal area over her clothing. She supposedly screamed, "Stop touching me" and "Get your fucking hands off me." Ms. Thomas ran and Mr. Diaz chased her. Ms. Thomas told that Mr. Diaz grabbed her, threw her to the ground, pinned her down by straddling her, and pinned her arms to the side by grabbing her biceps. When she screamed Mr. Diaz punched her in the mouth. Ms. Thomas reported that while straddling her, Mr. Diaz was "fidgeting" with his belt/pants, implying intent to remove his pants with the possible intent for sexual interaction. A witness reportedly saw Mr. Diaz "jump up and run away" from Jennifer Thomas.

Angela Caldwell reported Mr. Diaz followed her from one bar to another. When she left the second bar Mr. Diaz followed her. Ms. Caldwell estimated Mr. Diaz waited several hours for her to leave the second bar. She stated Mr. Diaz put his hands on her shoulders in a manner that she perceived as [sic] attempt to stop her from walking. Ms. Caldwell said Mr. Diaz kept trying to coax her off the sidewalk into the shadows. She suspected if she entered the shadows with Mr. Diaz, he might have attempted sexual contact.

Presentence report pp. 3-6.

The Court ordered a psychosexual examination and Dr. Johnston opined that Diaz was at high risk to reoffend sexually within the next 5-10 years as compared to other sexual offenders. He diagnosed Diaz with:

Adult Sexual Abuse by Non-spouse or Non-partner, confirmed

Other specified Paraphilic Disorder: Rape Interests (Provisional)

Antisocial Personality Traits

***

> The examinee was offered a provisional diagnosis for other specified paraphilic disorder, rape interest, associated with collateral information indicating a pattern of rape behavior. Continued monitoring would be advised, ...
>
> **RISK TO RE-OFFEND**
>
> ***
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> The examinee's risk to re-offend was based on consideration of the examinee's self-identified history, collateral information, psychological testing, static risk variables (variables that increase risk to re-offend and are un-changeable with treatment), dynamic risk variables (variable that increase risk to re-offend and are potentially changeable with treatment), and protective variables (variables that reduce risk to re-offend), in addition to consideration of the severity of the risk variables as they relate to volitional capacity issues that predispose the examinee to commit a sexual offense. Volitional capacity issues are associated with potential loss of behavioral control related to the presence of a mental condition that causes a likelihood of repeated illegal sexual behavior, and consideration of the severity of that mental condition. Also, determining risk to re-offend takes into consideration access to potential victims and opportunity for the examinee to engage in illegal sexual behavior.

Psychosexual examination report, p. 16-18.

Diaz's history of particularly concerning behavior began as soon as he arrived in Ada County. He claims he arrived in the United States at an unknown date and time in 2009 and immediately came to Meridian to live with his siblings. Diaz attended school in Meridian. He entered Centennial High School as a freshman in 2011. He left in December 2012. Between December 8, 2010 and March 1, 2012, he had 19 behavioral incidents in the school district. School officials caught him searching for "inappropriate pictures" of females on the internet at school three separate times. More than once the school identified him as a bully. He made sexual gestures at a teacher referring to oral sex with the teacher. Diaz was disrespectful and violent toward both students and teachers. He punched a student on the bus, got into a brawl on another occasion, acted violently toward a teacher in class, spit on another student, heckled another, threatened several, squared off to fight, and was belligerent. He called other students "puto" or gay. Attached is a copy of the log entries which clearly demonstrate what a difficult person he was in school.

His conviction record includes Reckless Driving (2012), Driver's License Violation (2012), Possession of Paraphernalia (2012), Battery (2012), Resisting and Obstruction (2012) and contempts and probation violations. Several other crimes were dismissed, some as part of a plea agreement, including Battery (2011), Aiding in Misdemeanor (2012), Possession of a Controlled Substance

(2012), and Disorderly Conduct (2012). Considering the fact that he has only been in the United States since 2009 by his own account, this is a troubling history.

Based on this history and the crime itself, the Court found that this sentence would promote rehabilitation; there is a need for some punishment that fits the crime before real rehabilitation will be effective. The Court finds that this sentence fulfills the objectives of protecting society and achieves deterrence, rehabilitation, and retribution, and therefore denies Diaz's Motion for Reconsideration.

IT IS SO ORDERED.

DATED this 22nd day of May 2014.

Cheri C. Copsey, District Judge